

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
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Rockville, Maryland 20850
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**Case No. S-2544
PETITION OF SPRINT PCS/APC REALTY AND EQUIPMENT COMPANY, LLC
AND DAL S. AND MYEONG S. HONG**

OPINION OF THE BOARD

(Hearings held August 27, 2003, December 3, 2003, and February 4, 2004)
(Effective Date of Opinion: October 25, 2004)

Case No. S-2544 is a petition for a special exception for the construction and operation of a telecommunications facility consisting of a 134-foot flagpole with three panel antennas inside the flagpole, six 3' by 3' by 6' equipment cabinets within a 50' by 50' compound, and screened by an 8-foot fence.

The subject property is Parcel A, Block B, Norbeck Knolls Subdivision, located at 2311 Norbeck Road, Silver Spring, Maryland, and is located in the RE-2 zone.

The petition is filed pursuant to Section 59-G-2.43 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the Zoning Ordinance). The Board held public hearings on the petition on August 27, 2003, December 3, 2003, and February 4, 2004. The Petitioner was represented by James R. Michal, Esquire. William J. Chen, Jr., Esquire, represented Guy A. Hanks, Jr., who intervened. Martin Klauber, Esquire, as Peoples' Counsel, also intervened.

Decision of the Board: Special exception **statutorily denied**.

On a motion to grant the petition by Member Louise L. Mayer, seconded by Member Angelo M. Caputo, and Chairman Donald H. Spence in agreement, with Vice-Chair Donna L. Barron and Member Allison Ishihara Fultz in opposition, the Board voted 3-2 to grant the petition.

Pursuant to Section 59-A-4.123(c) of the Zoning Ordinance, the affirmative vote of at least four members is required to adopt a resolution granting a special exception. Any resolution is statutorily denied if the necessary total of affirmative votes is not achieved for any reason. Section 59-A-4.123(g). While the Board is

therefore precluded from issuing an Opinion in this case, in the interest of informing the parties of the basis for the outcome, the dissenting Members hereby adopt the following statement of facts and conclusions.

The following statement represents the findings and conclusions of Board Members Donna L. Barron and Allison Ishihara Fultz, and is not the official Opinion of the Montgomery County Board of Appeals:

EVIDENCE PRESENTED

1. The subject property, known as 2311 Norbeck Road (the "Property"), is located in Silver Spring in the RE-2 zoning district. The Property is located on the north side of Norbeck Road at its intersection with Drury Road.

2. The Property is triangular in shape and consists of about 5.5 acres. The lot has about 410 feet of frontage on Norbeck Road and is about 1,227 feet deep. The Property is improved with a single-family dwelling unit that is centrally located on the lot about 500 feet from Norbeck Road. Behind and to the east of the dwelling is a brick church building. Access to the Property is gained via a gravel driveway from Norbeck Road that runs along the east side of the site and terminates in a gravel parking lot in front of the residence. The Property is heavily wooded along the Property lines, with trees as high as 70-90 feet in height. The topography of the site slopes up steeply near Norbeck Road and is relatively level in the remainder of the Property.

3. Vicinal properties include:

(a) To the west of the Property is Parcel 216, an unimproved 10.71 acre lot zoned RE-2.

(b) To the east of the Property is Parcel 211, which is also zoned RE-2, and which is improved with a single-family dwelling located about 280 feet from Norbeck Road and 108 feet from the adjoining Property line.

(c) To the south across Norbeck Road is a subdivision of R-200 zoned single-family homes.

(d) To the north of the Property is Parcel 925, an unimproved RE-2 zoned property.

4. The Petitioner proposes to erect on the Property a telecommunications facility consisting of a 134-foot high monopole and equipment compound. The monopole will be located approximately 253 feet from Norbeck Road, 136 feet from the western Property line, 974 feet from the northern tip of the Property, and 136 feet from the eastern Property line. The monopole will be 244 feet from the

residential dwelling situated on Parcel 211. It will be 417 feet from the nearest dwelling across Norbeck Road.

The monopole will be 34 inches in diameter at its base and taper to 19.5 inches in diameter at its top. The Petitioner will install three panel antennas within the monopole at an elevation of approximately 130 feet. The Petitioner states that the monopole will be designed to accommodate two additional carriers, whose antennas will also be installed inside the monopole. The antennas will be connected to equipment cabinets at the base of the monopole by coaxial cables which will also run inside the monopole. Neither the antennas nor the cables will be visible from the outside.

At the base of the monopole will be a 50' by 50' compound containing six equipment cabinets measuring about 6 feet high by 3 feet wide and 3 feet deep. The compound will be enclosed by an 8-foot high board-on-board wood fence.

Access to the facility will be gained via a 12-foot wide gravel driveway that will extend from the existing driveway and parking lot on the Property. The facility will operate 24 hours per day, seven days per week, but will require only periodic visits of one or two times per month for equipment maintenance or repair. The only utilities required will be electricity and land telephone lines.

5. The Petitioner originally proposed to locate the facility 15 feet to the south of the proposed location on the site. The Planning Board recommended that the facility be moved 15 feet north in order to avoid encroachment of 30% or more into the critical root zone of a 39" specimen Tulip Poplar tree on the Property. In response to this recommendation, the Petitioner revised its plan to relocate the facility to its presently proposed location.

6. The Petitioner originally proposed to "disguise" the monopole as a flagpole by flying an American flag at its pinnacle. The Petitioner proposed to light the flag at night through the use of two ground-mounted narrow beam spotlights at the base of the pole. The M-NCPPC staff report (Exhibit 84) indicates that, in addition to providing adequate coverage, part of the reason for the height of the monopole is to provide adequate clearance for the unfurling of the flag. In response to various objections raised by Opposition during the course of the hearings, the Petitioner offered to remove the flag and lighting from its proposal.

7. Paul Rosa, who qualified as an expert in the siting of communications towers and their impacts on adjoining properties, testified during the hearings that the proposed monopole is designed to be unusually tall because the Property is located at a low point among rolling hills (see Exhibit 165). He stated that if the tower were sited at the nearby Norbeck Community Church, which is 65 feet higher in elevation, the monopole would only need to be 80-90 feet tall. He stated that other telecommunications sites on which monopoles have been

disguised as flagpoles are generally open, flat, and are associated with a large institutional use such as a church or school (see Exhibit 162). He stated that he is not aware of a flagpole design of this size. Mr. Rosa also testified that recent technology in the telecommunications industry, such as a distributive antenna system, would allow the Petitioner to place antennas on telephone poles or other transmission facilities (Exhibit 160). Such a system is well suited for areas, like the one in which the Property is located, with rolling terrain and dense tree cover. He stated that, despite the trees on the Property, the full monopole will be visible from adjacent properties. He opined that a flagpole is not an appropriate stealth design for this site, as flagpoles are not normally placed in wooded areas but are usually found near larger buildings such as churches, schools, and stadiums.

CONCLUSIONS OF LAW

Based upon the testimony and the evidence of record, we conclude that the special exception must be denied. The requested special exception does not comply with the general and specific requirements for a telecommunications facility in the RE-2 zone as set forth in Sections 59-G-1.2 and 2.43 of the Zoning Ordinance. Specifically, we find that the petition fails to meet the following requirements:

Montgomery County Zoning Ordinance

Sec. 59-G-1.21. General conditions.

(a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

...

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

We find that the requested special exception does not comply with Section 59-G-2.43(j)(2)(d) (see discussion of specific conditions below).

(4) Will be in harmony with the general character of the neighborhood considering population density, design, scale, and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.

This general standard, like all general standards, is to be applied in light of the requirement of Section 59-G-1.2.1 that we consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood. Inherent effects are those physical and operational characteristics that are necessarily associated with a particular use. The finding of inherent effects alone is not a sufficient basis to deny a special exception. A finding of any physical or operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site, i.e., non-inherent effects, however, is a sufficient basis to deny a special exception.

While we recognize that the height and bulk of telecommunications poles varies, we believe the 134-foot height of the proposed structure is unusually tall. In our experience, telecommunications monopoles on properties like the one proposed by the Petitioner that have been approved by the Board in the past are ordinarily no more than 105 feet tall. (See Board of Appeals Case Nos. S-2526, S-2572, and S-2582). This conclusion is supported by the testimony of Mr. Rosa, an expert in the field. His testimony also tended to show that tall monopoles may no longer be a typical characteristic of telecommunications facilities. The advent of new technologies, such as the distributive antenna system, allow telecommunications antenna to be located on lower, less obtrusive structures. We therefore find that the 134-foot height of the Petitioner's proposed monopole is a non-inherent physical characteristic of this proposal.¹

Mr. Rosa also testified that the proposed monopole is exceptionally tall because it is being located at a low point in an area of hilly and wooded terrain. Ordinarily, such structures are found on flat properties with clear lines of sight. Also, they tend to be located on larger lots near large institutional structures, such as churches and schools. The Petitioner proposes to locate its facility on a relatively small, narrow, hilly, wooded residential property. While it would be situated next to a church facility, it is out of scale with the very small church building on the site. What's more, the facility will be located within 244 feet of a residential structure on the adjoining Parcel 211. We therefore find that the site itself has unusual characteristics that are not inherent to a telecommunications facility use.

Consequently, we conclude that the combination of the unusual height of the proposed tower, the unusually small and narrow shape of the proposed site,

¹ We recognize that Section 59-G-2.43(j)(3) provides that a support structure and antenna may not exceed 155 feet in height, which limitation may be increased to up to 199 feet under certain circumstances. We do not believe that this means that any telecommunications pole that is less than 155 feet must be approved. Indeed, the legislature has expressly instructed that "the fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted." Section 59-G-1.21(a)(2). It therefore remains within the Board's bailiwick, we think, to determine the height that is inherent in telecommunications facilities - a determination that may change over time and with the advancement of telecommunications technologies.

and its location in close proximity to a residential structure will result in a greater visual impact than typically associated with a telecommunications facility. Due to these non-inherent adverse effects, the proposed special exception is therefore not in harmony with the general character of the neighborhood.

(5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

For the same reasons stated under paragraph (4) above, we find that the unusual height of the proposed monopole and its close proximity to the residential structure on Parcel 211 will result in a non-inherent adverse visual impact that will be detrimental to the use, peaceful enjoyment, economic value and future development of the adjoining property.

Sec. 59-G-2.43. Public utility buildings, public utility structures and telecommunication facility.

(a) A public utility building or public utility structure, not otherwise permitted, may be allowed by special exception. The findings of this subsection (a) do not apply to electric power transmission or distribution lines carrying in excess of 69,000 volts. For other buildings or structures regulated by this section, the Board must make the following findings:

...

(j) Any telecommunication facility must satisfy the following standards:

...

(2) A support structure must be set back from any off-site dwelling as follows:

- a. In agricultural and residential zones, a distance of 300 feet.*
- b. In all other zones, one foot for every foot in height.*
- c. The setback is measured from the base of the support structure to the base of the nearest off-site dwelling.*
- d. The Board of Appeals may reduce the setback requirement in the agricultural and residential zones to a distance of one foot from an off-site residential building*

for every foot of height of the support structure if the applicant requests a reduction and evidence indicates that a support structure can be located in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, and visibility from the street.

The proposed telecommunications support structure is 244 feet from the residential dwelling located on Parcel 211 and therefore fails to meet the 300-foot setback requirement of Section 59-G-2.43(j)(2)a. The Board may, under subparagraph d. of this Section, agree to reduce the setback if the new location is less visually obtrusive. We find that the proposed location of the monopole is not less visually obtrusive, but more so, for the adjoining residential property on Parcel 211. The originally proposed location, at 15 feet to the south, would have placed the pole further from the Parcel 211 dwelling and still would have been over 260 feet from the front lot line and over 400 feet from the next closest home across Norbeck Road – well in excess of the minimum required setbacks. While locating the monopole further south on the Property may disturb some vegetation on the site, we think this harm is far outweighed by the adverse visual impact the proposed location of the structure will have on the adjoining property to the east – especially given its unusual height. We therefore conclude that the proposed location fails to meet the criterion of Section 59-G-2.43(j)(2)d and decline to approve the setback reduction.

For all of the foregoing reasons, we vote to deny the petition for a special exception for the construction and operation of a telecommunications facility filed in Case No. S-2544.

Donna L. Barron
Vice-chairman, Montgomery County Board of Appeals

Allison Ishihara Fultz
Chair, Montgomery County Board of Appeals

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

Allison Ishihara Fultz
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 25th day of October, 2004.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the Zoning Ordinance). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County on accordance with the Maryland Rules of Procedure.